IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO.165 OF 2004

R.Venkatesan ...Applicant

Versus

Union of India & Ors. ...Respondents

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Mr.Haresh Jagtiani for Applicant.

Mr.J.C.Satpute for Respondents 1 & 2.

Mr.K.V.Saste, A.P.P. for Respondent No.3.

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CORAM: A.M.KHANWILKAR, J.

APRIL 11, 2005.

P.C.

1. Heard Counsel for the parties.

2. Applicant had filed application for discharge before the Trial Court in respect of a pending trial against him for offences punishable under the provisions of The Prevention of Corruption Act and Indian Penal Code. That Application has been rejected by the Special Judge,

CBI, Greater Bombay by Judgment and Order dated November 20, 2003, essentially on the ground that the Applicant cannot be heard on his discharge application because he is an absconding accused. It is matter of record that proclamation proceedings were taken out and order has been passed against the Applicant in that behalf. Besides, non-bailable warrants are pending against the Applicant in connection with the trial, which is pending before the lower Court since 1998. The Applicant has so far successfully avoided arrest and is stated to be residing in U.S.A.

3. The moot question, therefore, which arises for my consideration is: whether any fault can be found with the approach of the lower Court in rejecting the discharge application merely because the Applicant is an absconding accused?

4. According to the learned Counsel for the Applicant even if the Applicant is an absconding accused, that does not absolve the Trial Court of its obligation to sift the evidence to ascertain whether charge ought to be framed against the

Applicant on the basis of materials produced before it; and if it is so, the fact that the accused is absconding, will make no difference and the Court will be obliged to consider the Application for discharge on its own merits, uninfluenced by the fact that the Applicant is absconding.

5. To buttress this proposition, reliance is placed on the decisions of the Apex Court in the case of **Union of India vs. Prafulla Kumar Samal reported in (1979) 3 SCC 4** and in the case of **Satish Mehra vs. Delhi Administration & Anr. reported in (1996) 9 SCC 766**.

6. Indeed, the abovesaid two decisions, which are pressed into service generally mention the parameters of Section 227 of the Criminal Procedure Code and the duty of the Trial Court in that behalf, which requires the Trial Judge to consider the case on its own merits and not to act as mere post office or a mouth piece of the prosecution. There can be no quarrel with the said principles and the trial Judge will be bound to abide by the same. However, these decisions are of no avail to

the fact situation of the present case. Inasmuch as, we are faced with a situation where the absconding accused has applied for discharge by taking out a formal application in that behalf. If such application is filed, obviously, that accused can be heard on merits only if he was to subject himself to the jurisdiction of the Trial Court. Accused would be treated as having subjected to the jurisdiction of the Trial Court, after he has appeared in person before the Court and released on bail; but by no stretch of imagination, an accused who is a fugitive accused and successfully avoided arrest after filing of charge-sheet against him, as back as on 30th September 1998, can be allowed to move the Trial Court for discharge through his Counsel.

7. To get over this position, Counsel for the Applicant suggested that as the Application has been filed in this Court, the Applicant may be treated to have subjected himself to the jurisdiction of this Court and be heard through his Counsel. Even this submission does not commend to me. In the first place, in criminal trial, the

accused cannot be said to have subjected to the jurisdiction of the Court, unless, he personally appears before the Court and avails of bail. There can be no other way such as appearance through Counsel, as is suggested. It will be a different matter where he appears before the Court and the Court exempts his personal presence. As requirement of subjecting to the jurisdiction of the Trial Court has not been complied by the present Applicant, the fact of filing of this Revision Application or appearance of his Advocate, can be of no avail. Besides, in a case where non-bailable warrants are pending against the Applicant and also proclamation proceedings have been taken out and his prayer for setting aside those proceedings have been rejected by the lower Court, it cannot be assumed that such Applicant has subjected himself to the jurisdiction of the Court by filing Application or through his Counsel as is contended. So long as the proclamation order and the order issuing non-bailable warrants against the Applicant operate, the Applicant cannot be heard on his application for discharge on merits. In other words, he cannot invite the Court to examine the

case on merits from his stand-point. True it is that Section 227 of the Code obligates the Court to hear the submissions of the accused on the point that there is no sufficient ground for proceeding against him, but the right to be heard is available only to those accused, who have subjected themselves to the jurisdiction of the Court, and not otherwise. Any right is always coupled with some duty. It is the duty of the accused to submit himself to the jurisdiction of the Court, before which, he is being tried for an offence. The accused cannot stay away from the Court and claim right of being heard on the question of framing charges so as to require the Court to examine the materials on record from his stand-point. At any rate, a fugitive accused against whom non-bailable warrants are pending and is also declared as proclaimed offender, cannot claim any right to be heard by the Court on the question of framing charges or discharge; for, that would entail in granting premium to such accused. Suffice it to observe that the Court is obliged to hear only those accused who have subjected themselves before the Court.

8. I should say, to the credit of the Counsel for the Applicant, that in all fairness, he has placed on record decision of this Court in the case of **Iqbal Mohammed Memon vs. State of Maharashtra reported in 1997(1) Mh.L.J. 790**, which had occasion to deal with similar fact situation. Indeed, it was a case of declining to hear the Revision Application preferred by absconding accused. I have no difficulty in adopting the principle underlying the said decision, so as to non-suit the absconding accused from moving discharge application.

9. Learned Counsel, however, made attempt to distinguish this Judgment on the argument that the fact situation in that case was somewhat different. However, I see no basis to accept that submission. On the other hand, the legal position has been clearly spelt out in this Judgment, which, in fact is following the opinion expressed by the Apex Court against the accused in that case, as can be discerned from the order of the Apex Court, which is reproduced in Paragraph 6 of the decision.

10. In addition to the said decision, I may usefully refer to the principle expounded by the Division Bench of our High Court in the case of **Vijay s/o Suryabhanji Kshirsagar s. State of Maharashtra reported in 2004(2) Mh.L.J. 39.** In this case, the Court was concerned with appeal against conviction filed by the accused. The accused was, however, found absconding, when the appeal came up for hearing. In Para 8 of this decision, while considering the fact situation of that case, it is observed that if the appeal was to be heard when the accused is absconding and it ultimately results in acquittal, then it will create a very bad impression in the minds of the persons facing criminal trial. For, they will carry an impression that their matter can be heard even if they abscond and they can get acquittal. Suffice it to observe that the Division Bench of our High Court has taken a view that when an accused who is absconding, who is fugitive from justice, who does not surrender to the jurisdiction of the Court and who disobeys and flouts the orders of the Court and also disrespects the bond executed

by him, has no right of being heard on merits. This exposition, in my opinion, applies *proprio vigore* to the fact situation of the present case. In my opinion, therefore, no fault can be found with the approach of the trial Judge in rejecting the application for discharge filed by an absconding accused on the reasoning that as he has not subjected to the jurisdiction of the Court, such fugitive accused cannot be heard on merits.

11. Viewed in this perspective, I see no reason to entertain this Revision Application. The same is therefore dismissed.

A.M.KHANWILKAR, J.